71

(4)

No. 06-1478

FILED
OCT 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S

In the Supreme Court of the United States

JACK E. ALDERMAN,
Petitioner,

v.

HILTON HALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR REHEARING

LEIV H. BLAD JR.
JON R. FRITZ
CLIFFORD CHANCE US LLP
2001 K STREET, NW
WASHINGTON, D.C. 20006
(202) 912-5000

THOMAS H. DUNN*
GEORGIA RESOURCE CENTER
303 ELIZABETH STREET
ATLANTA, GA 30309
(404) 222-9202

**Counsel of Record*

October 26, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITION FOR REHEARING 1

REASONS FOR REVIEWING THE ELEVENTH CIRCUIT'S DECISION 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Lambright v. Schriro,
490 F.3d 1103 (9th Cir. July 2, 2007) 1, 2

Morris v. Beard, No. Civ.A. 01-3070,
2007 WL 1795689 (E.D. Pa. June 20, 2007) ... 3

Rompilla v. Beard,
545 U.S. 374 (2005) 3

Sanitary Refrigerator Co. v. Winters,
280 U.S. 30 (1929) 1

Stevens v. McBride,
489 F.3d 883 (7th Cir. June 18, 2007) 2

Taylor v. Horn, No. 04-9016,
2007 WL 2728668 (3d Cir. Sept. 20, 2007) 3

Wiggins v. Smith, 539 U.S. 510 (2003) 3

Other

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) 2

PETITION FOR REHEARING

Petitioner Jack E. Alderman respectfully petitions this Court to vacate its Order entered October 1, 2007, denying Mr. Alderman's Petition for Writ of Certiorari filed May 7, 2007. This Court should rehear and grant Mr. Alderman's Petition for Writ of Certiorari because the Ninth, Seventh, and Third Circuit Courts of Appeals recently issued opinions that demonstrate a real circuit conflict on an issue of considerable national importance: whether defense counsel has an obligation to investigate all available mitigating evidence in preparing for the sentencing phase of a capital trial. This conflict is an intervening circumstance of a substantial and controlling effect. *See Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34 n.1 (1929).

REASONS FOR REVIEWING THE ELEVENTH CIRCUIT'S DECISION

A real conflict has arisen among the circuits since Mr. Alderman filed his Petition for Writ of Certiorari. The Ninth, Seventh, and Third Circuit Courts of Appeals have held that a capital defendant's constitutional right to effective assistance of counsel obligates defense counsel to fully investigate all available mitigating evidence in preparing for the sentencing phase of a capital trial.

The Ninth Circuit Court of Appeals recently held that "[t]o perform effectively . . . counsel must conduct sufficient investigation and engage in sufficient preparation to be able to present[ ] and explain[ ] the significance of all the available [mitigating] evidence."

Lambright v. Schriro, 490 F.3d 1103, 1116 (9th Cir. July 2, 2007) (internal citations and quotation marks omitted) (emphasis added). The court emphasized that "it is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Id.* (internal citations omitted).

Recognizing "counsel's duty to investigate all potentially mitigating evidence," the court concluded that "[o]nly after a thorough investigation can a less than complete presentation of mitigating evidence ever be deemed reasonable." *Id.* at 1120 (emphasis added). Counsel cannot uphold a defendant's constitutional right to effective assistance of counsel at the sentencing phase of a capital trial by conducting a truncated investigation and providing the jury with a cursory presentation of potentially mitigating factors. *Id.*

Similarly, the Seventh Circuit Court of Appeals recently acknowledged that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence." *Stevens v. McBride*, 489 F.3d 883, 895 (7th Cir. June 18, 2007) (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)) (emphasis added). In *Stevens*, the court acknowledged that although a decision by defense counsel not to investigate certain mitigating evidence might have been considered strategic during the guilt phase, this decision could not be considered strategic at the sentencing phase of a capital trial because the petitioner "had nothing left to lose." *Id.* at 896.

In another recent decision, the Third Circuit Court of Appeals recognized "the fundamental constitutional requirement that the fact-finder render a decision [in the sentencing phase of a capital trial] based upon full consideration of available mitigating evidence." *Taylor v. Horn*, No. 04-9016, 2007 WL 2728668, at *31 (3d Cir. Sept. 20, 2007) (emphasis added). The court stressed that defense counsel's investigation must include "efforts to discover *all reasonably available* mitigating evidence, including information about medical history, educational history, employment and training history, [and] family and social history." *Id.* (internal citations and quotations marks omitted); *see also Morris v. Beard*, No. Civ A. 01-3070, 2007 WL 1795689, at *22 (E.D. Pa. June 20, 2007) (stating, "Where a jury in a capital case has been precluded from hearing mitigating evidence concerning the defendant's character or background because counsel has made an objectively unreasonable decision not to look for it, counsel's performance violates the dictates of *Strickland*.") (citing *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 519-34 (2003)) (additional citations omitted).

These new decisions conflict with the Eleventh Circuit's decision below. While the Ninth, Seventh, and Third Circuits impose an obligation on defense counsel to fully investigate all available mitigating evidence, the Eleventh Circuit requires only that the trial court ask whether competent counsel would have adopted a trial strategy similar to that employed by capital sentencing counsel, regardless of whether there was additional available, but undiscovered, mitigating evidence. The Eleventh Circuit's standard is much

less exacting than the standard adopted by the Ninth, Seventh, and Third Circuits.

Here, counsel's investigation did not comprise efforts to discover all available mitigating evidence, nor did he engage in sufficient preparation to be able to present and explain the significance of what little mitigating evidence he did discover. Cert. Pet. App. 226a-30a; 233a-39a; 240a-41a; 250a-52a; 254a-56a. In so failing, counsel prevented Mr. Alderman's resentencing jury from rendering a decision based upon full consideration of all available mitigating evidence.

Mr. Alderman's case presents this Court with a clear opportunity to provide guidance to the lower courts on the applicable legal standard for upholding an individual's constitutional right to effective assistance of counsel at the sentencing phase of a capital trial. As shown in Mr. Alderman's Petition for Writ of Certiorari, there is a reasonable probability that, but for counsel's errors, the result of his resentencing trial would have been different. Cert. Pet. App. 263a; 278a-79a; 291a-94a. It is important for this Court to determine the appropriate legal standard, particularly because the difference between the Circuits' standards can mean the difference between life and death for Mr. Alderman and other capital defendants.

CONCLUSION

These recent decisions demonstrate a real circuit conflict on a question of considerable national importance that this Court should review without

waiting for additional courts to weigh in. Mr. Alderman respectfully requests that this Court grant certiorari and review the Eleventh Circuit's decision before the State of Georgia executes another individual who failed to receive his constitutional right to effective assistance of counsel.

Respectfully Submitted,

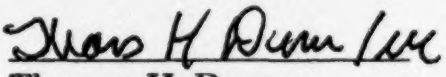
Leiv H. Blad Jr.
Jon R. Fritz
Clifford Chance US LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 912-5000

Thomas H. Dunn
Counsel of Record
Georgia Resource Center
303 Elizabeth Street
Atlanta, GA 30309
(404) 222-9202

Counsel for Petitioner

CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.



Thomas H. Dunn
Counsel of Record for Petitioner